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Separation of Powers and the Governor's Office in West Virginia: Advocating a More Deferential Approach to the Chief Executive From the Judiciary

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SEPARATION OF POWERS AND THE GOVERNOR'S OFFICE IN WEST VIRGINIA: ADVOCATING A MORE DEFERENTIAL APPROACH TO THE CHIEF EXECUTIVE FROM THE JUDICIARY

I. INTRODUCTION

As state governments began to wield greater influence in policy-making at the beginning of the twentieth century vis-à-vis the federal government, the governors of those states seized the opportunity to play a larger role in the over-

all political landscape.[1] This notion proved to gradually erode the traditional "Rule by Legislatures" that had dominated virtually all levels of government in early United States history.[2] Gubernatorial power greatly increased throughout the century, which resulted in more balance between the executive and legislative branches of government.[3] Recently, legislatures' institutional capacities have also significantly developed in response to the evolution of the administrative state.[4] As a result, power struggles over each branch's control of state government have ensued.[5]

This Note examines some of these power struggles in West Virginia, with particular emphasis on the unique legal issues surrounding the political process and gubernatorial power. After an in-depth analysis of separation of powers in West Virginia, this Note concludes that West Virginia's Governor is one of the most powerful in the United States and deserves the institutional deference necessary to implement policy objectives.

One commentator has remarked that in the era following the Great Depression, "the separation of powers doctrine exhibited signs of diminished significance [and] executive authority in the decision[-]making process expanded to a remarkable degree."[6] While separation of powers questions at the federal level often take a back seat to other federalism issues, "they have assumed greater significance . . . in the states."[7] Professor Stanley Friedelbaum explained that "there is less emphasis on economic power, not unexpectedly, in view of an increasing shift of responsibility to federal agencies during the middle and later decades of the twentieth century. State issues have been of a more traditional type, while still reflecting the problems of contemporary society."[8] The State of West Virginia did not buck this trend.

On September 6, 2005, West Virginia Governor Joe Manchin, III, issued a proclamation calling the Legislature into a special session aimed at reducing the state's pension debt, enacting a pay increase for state employees, and reducing the sales tax on food by one percent.[9] Surprisingly, the food tax reduc-

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1 Rogan Kersh, Suzanne B. Mettler, Grant D. Reeher, & Jeffrey M. Stonecash, *"More a Distinction of Words than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 6 (1998).

2 *Id.* at 5–6.

3 *Id.* at 6.

4 *Id.* at 38.

5 *Id.* at 6.

6 Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1418 (1998).

7 *Id.* at 1421. *See generally* G. Alan Tarr, *State Constitutional Politics: A Historical Perspective*, *in* CONSTITUTIONAL POLITICS IN THE STATES 3, 5–9 (G. Alan Tarr ed., 1996) (discussing the distribution of political power in the states).

8 Friedelbaum, *supra* note 6, at 1421.

9 Phil Kabler, *1-Cent Tax Cut, Pay Raises on Special Session Agenda*, CHARLESTON GAZETTE, Sept. 7, 2005, at 1A.

tion sparked the most debate and attracted the most attention. Governor Manchin had promised to "responsibly" eliminate the food tax before he left office.[10] His goal was to eliminate the tax gradually to avoid creating an immediate multi-million dollar hole in an already unpredictable state budget.[11] While Manchin secured support for his proposal from the majority of Democrats in both houses of the Legislature, a number of Republicans had other ideas, which eventually led to a constitutional challenge before the Supreme Court of Appeals of West Virginia.

Article VII, Section 7 of the West Virginia Constitution permits the Governor to call the Legislature into an "Extraordinary Legislative Session" outside the traditional timetable of the regular sixty-day session and vests the power to set the agenda of these sessions in a proclamation signed by the Governor.[12] The Supreme Court of Appeals requires that during a special session, the Legislature shall enter into only the business stated in the proclamation.[13] The proclamation may suggest means of accomplishing the business, but it cannot prescribe or limit the manner in which the Legislature may act.[14] In the separation of powers context, the Supreme Court of Appeals has previously interpreted this constitutional provision to secure the sanctity of the separation of powers among the three separate, but co-equal, branches of state government.[15]

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[10] Scott Finn, *Plan to Cut Tax on Food Outlined; Manchin Would Link Reduction to Meeting Three Benchmarks*, CHARLESTON GAZETTE, Sept. 16, 2005, at 1A.

[11] *Id.*

[12] ROBERT M. BASTRESS, THE WEST VIRGINIA CONSTITUTION: A REFERENCE GUIDE 191–92 (1995). Professor Bastress is the John W. Fisher, II, Professor of Law at the West Virginia University College of Law and is widely regarded as the foremost authority on constitutional law in West Virginia.

[13] W. VA. CONST. art. VII, § 7, *construed in* State Rd. Comm'n v. W. Va. Bridge Comm'n, 166 S.E. 11, 12 (W. Va. 1932).

[14] *State Rd. Comm'n*, 166 S.E. at 13.

[15] *See, e.g.*, State *ex rel.* Farley v. Spaulding, 507 S.E.2d 376, 382 (W. Va. 1998) (recognizing that the separation of powers doctrine requires the three branches of government to be separate and distinct). Insightful discussions of state separation of powers jurisprudence can also be found in Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049 (1999); Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990); John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993); Andrew C. Spiropoulos, *The Garvee Bonds Case and Executive Power: Breakthrough or Blip?*, 56 OKLA. L. REV. 327 (2003). In addition, the following recent symposia, *Dual Enforcement of Constitutional Norms: State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. AND MARY L. REV. 1499 (2005) and *Separation of Powers in State Constitutional Law*, 4 ROGER WILLIAMS U. L. REV. 1 (1998), have addressed this topic, but neither has anything to say about West Virginia. The lack of commentary specifically focusing on this area of constitutional law in West Virginia precipitated the need for this Note.

A larger-than-expected budget surplus at the conclusion of the previous fiscal year allowed Governor Manchin and legislative leaders to give public employees a raise and offer tax relief to West Virginia citizens.[16] Since taking office in January 2005, Manchin emphasized that the focus of his administration would be to get the State's "financial house in order," and thus not make any hasty decisions regarding taxes.[17] With that in mind, the Governor narrowly drafted the proclamation in an attempt to head off Republican efforts to completely eliminate the food tax during the special session.[18] The pertinent language in the proclamation called for legislation reducing the food tax "by an amount *not to exceed* one percent."[19]

Some Republicans in the State Senate did not appreciate the Governor's attempt to limit debate on the food tax issue.[20] In response to the Governor, Senate Minority Leader Vic Sprouse filed a mandamus lawsuit in the Supreme Court of Appeals against Governor Manchin, Senate President Earl Ray Tomblin, and Speaker of the House of Delegates Robert Kiss.[21] The Minority Leader preemptively argued that "in narrowly writing the proclamation language at issue, the Governor unlawfully encroached upon duties . . . reserved to the Legislature."[22]

To the relief of constitutional scholars and political observers throughout the State, the Supreme Court did not take the bait. In a unanimous decision, the court threw out the lawsuit and rejected Sprouse's request to force Governor Manchin to remove the one-percent cap on the food tax rollback from his proclamation.[23] Calling the case "premature," the justices raised separation of powers issues and asserted in dicta that the court needs a compelling constitutional reason before it strikes down part of a gubernatorial proclamation.[24]

Concurring in the judgment, Chief Justice Joseph Albright, a former Speaker of the House of Delegates, stated that "we must view such a situation, while it is progressing, as distinctly a part of the political process, *into which*

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16 Lawrence Messina, *Manchin Eyes Temporary Food Tax Break; Leaders May be Asked During Special Session to Use Budget Surplus to Fund Proposal*, CHARLESTON DAILY MAIL, July 13, 2005, at 1C.

17 Phil Kabler, *Manchin Plans Special Session*, CHARLESTON GAZETTE, Nov. 8, 2005, at 1C.

18 Scott Finn, *Food Tax Has History of Coming and Going*, CHARLESTON GAZETTE, Sept. 4, 2005, at 1A.

19 Phil Kabler, *Little Progress Reported at Capitol; Closed-Door Caucuses Held on Food Tax Cut, Gambling*, CHARLESTON GAZETTE, Sept. 8, 2005, at 1A (emphasis added).

20 Scott Finn, *Tax Fight Starts Today; Constitutional Showdown on Food Tax Cut Set Off by GOP*, CHARLESTON GAZETTE, Sept. 12, 2005, at 1A.

21 State *ex rel.* Sprouse v. Manchin, 2005 W. Va. 32854 (Sept. 12, 2005), *available at* http://www.state.wv.us/wvsca/docs/spring05/32854.pdf.

22 *Id.*

23 Phil Kabler, *Court Rebuffs Sprouse; Lawsuit Over Food Tax is Premature, Justices Say*, CHARLESTON GAZETTE, Sept. 13, 2005, at 1A.

24 *Sprouse*, No. 32854.

this Court has no business intruding."[25] Moreover, the Chief Justice explained that "[t]he power of this [c]ourt to resolve actual constitutional disputes arising between the co-equal branches of our state government ought to be exercised sparingly and only where the need for judicial intervention has been clearly shown."[26] Moments after the court's ruling, both the House and Senate Finance Committees advanced the bill, which later passed in accordance with the Governor's wishes.[27] Manchin signed the one-percent reduction into law only days later.[28]

Decisions from the Supreme Court of Appeals of West Virginia like the food tax case, where the justices either simply refuse to intervene in a dispute between other branches of state government or expressly defer to the political process, are often the exception rather than the rule.[29] Through an examination of the structure and meaning of the separation of powers clause in the West Virginia Constitution, and a brief overview of the history and purpose of separation of powers at the state level, this Note will argue that courts should defer to political branch agreements and refrain from drawing specific lines dividing authority between the various branches of state government unless specific constitutional provisions are violated.[30] As Professor Jonathan Zasloff argues, "judicial attempts to referee political struggles have gone awry, and have been compounded by the reliance on federal separation of powers precedent that simply does not apply to the state constitution."[31]

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[25] *Id.* ¶ 10 (Albright, J., concurring) (emphasis added).

[26] *Id.* ¶ 11.

[27] Phil Kabler, *1% Cut in Food Tax Approved; Measure Passes After Harsh Debate*, CHARLESTON GAZETTE, Sept. 14, 2005, at 1A.

[28] Lawrence Messina, *Other States Manage Two Food Tax Rates*, CHARLESTON GAZETTE, Nov. 10, 2005, at 1C.

[29] This statement should not be construed as a criticism of the court. As will become clear, deciding state separation of powers issues has become increasingly difficult due to the confusing nature of applying the separation of powers doctrine to state constitutions and because of the impact of the administrative state on state governments. *See generally* Matthew L. Clark, *State ex rel. Holmes v. Gainer: The Legislative Pay Raise and the Disappearing West Virginia Constitution*, 97 W. VA. L. REV. 853 (1995); John Patrick Hagan, *Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985*, 89 W. VA. L. REV. 149 (1986); Thomas B. Miller, *The New Federalism in West Virginia*, 90 W. VA. L. REV. 51 (1987); Gene R. Nichol, *Dialectical Federalism: A Tribute to the West Virginia Supreme Court of Appeals*, 90 W. VA. L. REV. 91 (1987).

[30] *See* Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1083 (2004). Professor Zasloff's article presented the first comprehensive analysis of separation of powers under the California Constitution and suggested a general theory of separation of powers for state constitutional law nationwide. The theory outlined in this Note is similar to Professor Zasloff's proposal for California. To say, however, that the California Constitution is different from West Virginia's would be a vast understatement. Nonetheless, Professor Zasloff provides a framework generally applicable to other states, including West Virginia.

[31] *Id.* at 1079.

Part II of this Note provides an understanding of separation of powers, including the general nature of state constitutions and their underlying ideas. Before turning specifically to West Virginia decisions, Part III offers a general perspective on separation of powers jurisprudence in the Mountain State through the context of the so-called "formalist" versus "functionalist" theories of constitutional interpretation. Surprisingly, the Supreme Court of Appeals has utilized both theories, which naturally has generated confusion.[32] Although a complete review of all the cases where the Supreme Court of Appeals has applied the doctrine of separation of powers is beyond the scope of this Note, Part IV will discuss several key cases including the 2003 decision in *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*.[33]

Part V highlights the powers of the Governor's Office to provide the political context for examining separation of powers jurisprudence and foreshadows the importance of a functional approach to deciding these cases. Finally, Part VI argues that the two general approaches to deciding separation of powers cases are not mutually exclusive. Thus, some cases may lend themselves more to a formalistic approach than others and vice-versa. West Virginia, however, would be best served if the Supreme Court of Appeals consistently applied a deferential form of constitutional interpretation when confronted with these separation of powers issues. This approach should prevent the court from intervening in everyday disputes over control of the administrative state that could disrupt carefully crafted political compromises. For example, attempting to distinguish "executive" power from other types of governmental power in analyzing separation of powers issues often misses the forest for the trees because such distinctions offer "no judicially administrable standards for principled decision-making."[34]

II. BACKGROUND

Even a brief examination of state constitutions confirms their distinctiveness when compared to the Federal Constitution.[35] The Federal Constitution restricts the national government both by granting it limited powers and by imposing prohibitions on its own power.[36] In contrast, the first restriction is largely missing in state constitutions, which allows states to exercise plenary

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32 *See* BASTRESS, *supra* note 12, at 125 (stating that the Supreme Court of Appeals of West Virginia has analyzed separation of powers cases under both theories).

33 State *ex rel.* W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm., 580 S.E.2d 869 (W. Va. 2003).

34 Zasloff, *supra* note 30, at 1083.

35 G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 329 (2003).

36 *Id.*

authority.[37] Therefore, "despite some . . . similarities, state governments are not . . . miniature versions of the national government."[38] Moreover, "the Federal Constitution does not impose separation of powers restrictions on the states," which allows for state-specific "institutional arrangements and relationships."[39]

While state courts may follow federal precedent with regard to interpreting their own states' constitutions, they are not required to do so.[40] In fact, state courts sometimes apply a federal precedent to state issues in ways not contemplated by federal judges.[41] This concept often leads to undesirable results; the separation of powers doctrine is one such example.

Most often referred to as providing inspiration to the constitutional framers for dividing and sharing power is Montesquieu.[42] Certainly, "federal and state constitutions agree with Montesquieu['s theory of having] . . . three branches of government—legislative, executive, and judicial—each invested with a distinct function."[43] Nevertheless, the works of John Locke, George Mason, and James Madison also influenced the early decisions that emphasized the importance of shared powers among varying institutions of government.[44] These institutions created at the national and state levels have a "surface" similarity: state legislature and Congress, Governor and President, state supreme court and United States Supreme Court.[45] Beyond the surface, however, the similarities end. Professor G. Alan Tarr describes the evolution of separation of powers this way:

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37 *Id.*

38 *Id.* at 330.

39 *Id.*

40 *Id.* at 330–31.

41 *See* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 88 (1998) (arguing that because of significant differences between separation of powers issues at the federal and state levels, one would expect less deference by states to federal separation of powers doctrine); *see also* Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031 (2002) (discussing state constitutional decisions adopting federal constitutional law standards without examination); James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109 (1998) (arguing that the convergence of state and federal constitutional law can be explained "in part as the natural continuation of a long, powerful tradition on the state level of constitutional universalism"); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997) (discussing the effects of separation of powers in state courts as compared to federal courts).

42 Kersh et al., *supra* note 1, at 10.

43 Tarr, *supra* note 35, at 333.

44 BASTRESS, *supra* note 12, at 124.

45 Tarr, *supra* note 35, at 333. There are some variations of this structure among the states. For example, Nebraska has a unicameral legislature and whereas the federal constitution creates a unitary executive, most state constitutions create multiple, separately elected executive offices. *Id.* at n.19.

> The Federal Constitution offers what might be termed a relaxed version of the separation of powers. The major concern in 1787 was to introduce checks on the legislative branch which, as James Madison warned in Federalist No. 51, "necessarily, predominates" in republican governments. In order to facilitate checks and balances, Madison in Federalist No. 47 proposed a rather lax definition of what constitutes a violation of separation of powers: "where the whole power of one department is exercised by the same hands which possess the whole power of another department." Obviously, this definition affords considerable leeway for a sharing or blending of powers. Most early state constitutions reflected a quite different sensibility.[46]

More than a decade before the national Constitutional Convention approved our Federal Constitution, the "colonies-turned-states" began drafting their own governing documents.[47] These documents included statements adopting the doctrine of separation of powers.[48] The primary difference between the Federal Constitution and state constitutions with regard to executive power is that unlike the unified executive authority vested in the President, a majority of states have a "non-unified," or "divided" executive branch.[49] In forty-three states, including West Virginia, the executive branch consists of other elected executive department officers in addition to the Governor.[50] In West Virginia, these other officers are the Secretary of State, Treasurer, Attorney General, Auditor, and Commissioner of Agriculture.[51] Not only can the other executive officers be members of a different political party than the Governor, but they also may, and often do, have different policy views.[52] This Note focuses specifically on the Governor's Office in the executive branch and court decisions implicating the separation of powers doctrine.

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46 *Id.* at 333–34.

47 *Id.*

48 *Id.* at 337.

49 Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 722 (1997).

50 *Id.*

51 W. VA. BLUE BOOK (Darrell E. Holmes ed., vol. 85, 2003).

52 McGinley, *supra* note 49, at 722.

III. SEPARATION OF POWERS IN WEST VIRGINIA

> *"No theory of government has been more loudly acclaimed."*[53]

In the West Virginia Constitution, Article V outlines the doctrine of separation of powers. It states, "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time."[54] The Supreme Court of Appeals of West Virginia finds it difficult to interpret the phrase "separate and distinct" with any degree of consistency.[55] Nonetheless, legal scholars often speak of separation of powers jurisprudence as falling into either a "formalist"[56] or a "functionalist"[57] category. The law in West Virginia is no exception.[58]

A. *The Formalist Theory*

Professor Zasloff asserts that the formalist approach identifies the intrinsic nature of a particular governmental power by posing the following question, "Has one branch exercised a power that by definition 'belongs' to another? If so, then such exercise violates the separation of powers."[59] This approach

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53 State v. Huber, 40 S.E.2d 11, 18 (W. Va. 1946) (emphasis added).

54 W. VA. CONST. art. V, § 1.

55 BASTRESS, *supra* note 12, at 125.

56 Insightful discussion and commentary on the formalist approach can be found in Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Martin H. Redish, *The Constitution as Political Structure* (1995).

57 Scholarship discussing the functionalist view include Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) [hereinafter Strauss, *Formal and Functional Analysis*]; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *Places of Agencies in Government*].

58 *See* BASTRESS, *supra* note 12, at 125 (stating that the Supreme Court of Appeals of West Virginia has analyzed separation of powers cases under both theories).

59 Zasloff, *supra* note 30, at 1085.

requires judges to neatly divide governmental powers by branch.[60] Varying justifications are offered to support the formalist position. These justifications, which include the argument that the Framers intended to have strict separation that ultimately would lead to "more effective and efficient government,"[61] focus on "history, political theory, [and] administrative considerations."[62]

The Supreme Court of Appeals previously has used this formalistic approach. The court has stated that "the plain language of Article V calls not for construction, but only for obedience,"[63] and must be "closely followed."[64] In these decisions, the court's objective was to label the allocation of power in question as either "legislative, executive, or judicial," and if the allocation failed to match the label, the law would be struck down as a violation of separation of powers.[65] Professor Robert Bastress provides another example in *State ex rel. Richardson v. County Court of Kanawha County*,[66] where the court invalidated a law that authorized the now defunct domestic relations court in Kanawha County to fix salaries of probation officers and clerical staff.[67] The statute "attempted to confer a function on the courts that was deemed to be a legislative task, not a judicial one."[68]

B. The Functionalist Theory

On the other hand, "functionalist theories do not attempt to provide clear labels for governmental functions."[69] Instead, these theories "seek to determine whether a proposed action or statute undermines the balance of power between the branches."[70] Proponents of the functionalist theory insist that the Framers desired a "flexible approach to the separation of powers."[71] In the modern administrative state, functionalists argue that separating each governmental administrative function into three distinct categories is not only unneces-

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60 *Id.*

61 *Id.*

62 *Id.*

63 Hodges v. Pub. Serv. Comm'n, 159 S.E. 834, 836 (W. Va. 1931).

64 State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 630 (W. Va. 1981).

65 BASTRESS, *supra* note 12, at 125.

66 State *ex rel.* Richardson v. County Court of Kanawha County, 78 S.E.2d 569 (W. Va. 1953). Professor Bastress initially framed the debate over the West Virginia courts' use of the two separation of powers theories in his reference guide on the West Virginia Constitution, BASTRESS, *supra* note 12.

67 BASTRESS, *supra* note 12, at 125.

68 *Id.*

69 Zasloff, *supra* note 30, at 1086.

70 *Id.*

71 *Id.*; *see also* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (noting that scholars suggest the growth of the administrative state should cause fear of an "imperial presidency").

sary, but also impossible because administrative agencies combine the powers of all three branches.[72]

The Supreme Court of Appeals has experimented more frequently with the flexible functionalist approach to interpreting Article V. In *Appalachian Power Company v. Public Service Commission*, the court noted that "in order to make government workable and economical, it must lend itself to practical considerations."[73] Professor Bastress argues that this analysis is consistent with the West Virginia Constitution, taken as a whole, because it outlines a government of "shared, not distinct, powers."[74] Moreover, Bastress asserts that "the court's role is to apply Article V to ensure that the system of government in the state remains balanced and that no one branch assumes powers specifically delegated to another, or imposes burdens on another, or passes on its own responsibilities to another branch in such a manner as to threaten the balance of power, facilitate tyranny, or weaken the system of government."[75]

In *Appalachian Power*, Justice Thomas Miller opined that the court "recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern day government and particularly the proliferation of administrative agencies."[76] However, Justice Miller qualified the statement of flexibility by cautioning that the court would not hesitate to use the separation of powers doctrine "where we felt there was a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government."[77] Justice Franklin Cleckley aptly described the court's flexible view in deciding separation of powers decisions by maintaining that "characterizing a particular task as 'legislative,' 'executive,' or 'judicial,' though sometimes relevant, frequently hides the rationale rather than explains it."[78]

In a 2005 case deciding the constitutionality of certain provisions in a medical malpractice reform package enacted by the Legislature, the court summarized the current state of the law with regard to separation of powers.[79] Of particular interest were comments made by Justice Robin Davis in prior cases cited by the majority opinion. She previously wrote that the separation of powers clause "is given life by each branch of government working exclusively

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72 Zasloff, *supra* note 30, at 1086–87. *See also* Strauss, *Formal and Functional Analysis*, *supra* note 57, at 526 (asserting that "although formalism has its advantages and functionalism its dangers, the former is simply incapable of describing the government we have").

73 Appalachian Power Co. v. Pub. Serv. Comm'n, 296 S.E.2d 887, 889 (W. Va. 1982) (quoting Chapman v. Huntington, W. Va. Hous. Auth., 3 S.E.2d 502, 510 (W. Va. 1939)).

74 BASTRESS, *supra* note 12, at 125–26.

75 *Id.* at 126.

76 *Appalachian Power Co.*, 296 S.E.2d at 889.

77 *Id.*

78 Frymer-Halloran v. Paige, 458 S.E.2d 780, 787 (W. Va. 1995).

79 Hinchman v. Gillette, 618 S.E.2d 387, 396–97 (W. Va. 2005).

within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government."[80] Moreover, the separation of powers clause literally "compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a co-equal branch."[81]

IV. WEST VIRGINIA CASES

Since 1976, the Supreme Court of Appeals of West Virginia has issued a number of "significant, far-reaching, and controversial" rulings in wide-ranging policy areas not limited to separation of powers.[82] The philosophical direction of the court and its place in our constitutional system has generated significant debate and controversy that undoubtedly will continue in the future.[83] Professor John Patrick Hagan wrote, "the court's decisions strike many observers as being more overtly 'policy-oriented' than in the past, and occasional public disputes among the justices (most often in the form of separate concurring or dissenting opinions) give the impression of disagreement about the court's fundamental role in the political system."[84]

The court perpetuates this disagreement when analyzing separation of powers issues, particularly in cases from the late 1990s. In the 2005 term, however, the justices seized the opportunity presented by several hot-button issues and engaged in a thorough examination of separation of powers jurisprudence in the context of the relationship among the three branches of government.

A. State *ex rel.* Barker v. Manchin[85]

In what became a landmark decision in West Virginia administrative law, the Supreme Court of Appeals held that sections of the West Virginia Administrative Procedures Act ("WVAPA"), which empowered a legislative rule-

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80 *Id.* at 397 (quoting State *ex rel.* Affiliated Constr. Trades Found. v. Vieweg, 520 S.E.2d 854, 869 (W. Va. 1999) (Davis, J., concurring)).

81 *Id.* (quoting *Farley*, 507 S.E.2d at 387–88 (Davis, C.J., dissenting)).

82 Hagan, *supra* note 29, at 152 (asserting that certain aspects of "policy activism" were embraced by the Supreme Court of Appeals after 1976 through a combination of an "underlying liberal 'reform movement' in state electoral politics"). For example, the court has declared the state's system of property tax-based public school financing to be unconstitutional; ordered a comprehensive restructuring of the state property tax assessment and appraisal system; barred direct legislative review of agency rule-making activities on the basis of separation of powers considerations; and invalidated a gubernatorial veto in order to protect funding of the constitutionally mandated governmental programs involving public education. *Id.* at 152–53.

83 *Id.* at 152.

84 *Id.*

85 State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981). The "Manchin" named as a party in this case was the late Secretary of State A. James Manchin and should not be confused with Joe Manchin, III, the 34th Governor of West Virginia.

making review committee to veto rules and regulations otherwise validly promulgated by executive agencies, violated the separation of powers clause in the state constitution.[86] In 1976, the Legislature amended the WVAPA to create a new legislative body, the Legislative Rule-Making Review Committee.[87] This committee was a bipartisan body consisting of six members of the Senate and six members of the House of Delegates.[88] The President of the Senate and Speaker of the House were nonvoting members designated as co-chairmen of the committee and subsequently appointed its members.[89] The mission of the committee was to "review all rules or regulations of the . . . agencies following the proposal thereof."[90]

The committee was given plenary power to veto administrative rules and regulations, subject only to reversal by the entire Legislature.[91] The Legislature thus intended that no new rule or regulation would become effective without the approval of the committee.[92] The case arose when the committee rejected certain regulations proposed by the agency charged with governing surface mine safety.[93] Mr. Barker, a miner, asserted the provisions of the WVAPA creating the committee were unconstitutional.[94] The majority opinion, written by Justice Darrell McGraw,[95] held that the statutory rule-making review mechanism violated the separation of powers doctrine.[96]

Justice McGraw's opinion adopted a formalist approach to separation of powers in maintaining that the doctrine is part of the "fundamental law of our State and, as such, it must be strictly construed and closely followed."[97] After examining the powers and duties of both the legislative and executive branches, the court found that the mechanism of a "legislative veto" permitted the Legislature to assert power exclusive to the Governor.[98] The court reasoned that the legislative veto power "reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or the veto of the Governor."[99] Moreover, the court concluded that the "constitutional provisions clearly limit the power of the Legislature to give the binding effect of law to its

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86 *Id.*

87 W. VA. CODE § 29A-3-22 (2005); *Barker*, 279 S.E.2d at 625–26.

88 *Barker*, 279 S.E.2d at 626.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 627.

94 *Id.*

95 Darrell McGraw is currently the West Virginia Attorney General.

96 *Barker*, 279 S.E.2d at 636.

97 *Id.* at 630.

98 *Id.* at 632.

99 *Id.*

actions. It may create law only by following the formal enactment process. Where it seeks to give legal force to informal actions, the Legislature exceeds the limits of its constitutional authority."[100]

This case was one of the first decisions where the court explicitly preserved a power of the executive branch. The court noted that any attempt by the Legislature to make an "end run" around the state constitution through enacting an "extra-legislative control device" would violate separation of powers.[101] The United States Supreme Court subsequently reached the same decision in *INS v. Chadha* when the Justices declared the federal version of the legislative veto unconstitutional.[102]

B. Rice v. Underwood[103]

This case originated from a gubernatorial appointment to the State Racing Commission. Governor Gaston Caperton appointed Mr. Rice as member of the Commission in August 1996, Caperton's final year in office.[104] The Senate confirmed the appointment in October 1996, for a term ending April 1, 2000.[105] In January 1997, Cecil Underwood became Governor and reviewed various appointments made during the Caperton Administration. As part of this review, Governor Underwood removed Rice from the Commission in November 1997, without cause.[106] Shortly thereafter, Rice filed suit in Kanawha County Circuit Court requesting the court to find that Governor Underwood's decision to remove him was impermissible. Rice argued that Underwood's actions were an unconstitutional violation of separation of powers because the Legislature provided for the removal of Commission members and, as such, the Governor could not "use the sword of removal of a quasi-judicial or quasi-legislative public officer simply because he wishes to have someone of his own choosing in that office."[107]

The circuit court rejected Rice's contentions because he "served as a member of the Racing Commission at the Governor's will and pleasure and, therefore, Governor Underwood was entitled to remove [him]."[108] On appeal, the Supreme Court of Appeals affirmed the lower court's decision. The major-

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100 *Id.* at 633.

101 *Id.*

102 INS v. Chadha, 462 U.S. 919 (1983). While the fundamental issue of the legislative branch attempting to exercise "executive" veto power was essentially the same in both the United States Supreme Court case and the West Virginia Supreme Court of Appeals case, it is important to keep in mind the distinction between the executive branches at the federal and state levels.

103 Rice v. Underwood, 517 S.E.2d 751 (W. Va. 1998).

104 *Id.* at 755.

105 *Id.*

106 *Id.*

107 *Id.* at 756.

108 *Id.* at 755.

ity opinion, authored by Justice Margaret Workman, signaled the court's slight shift to more flexible, functional reasoning. The court found that the Racing Commission, like other administrative agencies, performs some "quasi-judicial functions when it hears appeals of license applications or permit revocations, and investigates regulatory violations."[109]

Nevertheless, the delegation of quasi-judicial powers to an administrative agency, which includes the power to conduct hearings and make findings of fact, was held not to violate the separation of powers doctrine.[110] Furthermore, Justice Workman noted that the Legislature desired members of the Racing Commission be subject to oversight by an elected official—in this case the Governor—given the nature of the Commission's role as a public corporation that generated significant revenue for the State.[111]

Rice maintained that the statute[112] granting the Governor the power to remove a quasi-judicial or quasi-legislative public official is invalid because it attempts to confer judicial and legislative power on the executive branch.[113] The court flatly rejected his contention and held that "there can be no doubt that the people, through their Constitution, may authorize one of the departments to exercise powers otherwise rightfully belonging to another department."[114] This holding and rationale was a significant change from the previous case because it marked the beginning of the court's explicit recognition that a formalistic approach to interpreting separation of powers cases was almost impossible.

C. State *ex rel.* McGraw v. Burton[115]

Professor Patrick McGinley has remarked that, for almost a century, West Virginia's Attorney General[116] has "struggled intermittently with other

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109 *Id.* at 757.

110 *Id.*

111 *Id.*

112 *See* W. VA. CODE § 6-6-4 (2005) (providing that "[a]ny person who has been, or may hereafter be appointed by the governor to any office or position of trust under the laws of this state, whether his tenure of office is fixed by law or not, may be removed by the governor at his will and pleasure. In removing such officer, appointee, or employee, it shall not be necessary for the governor to assign any cause for such removal").

113 *Rice*, 517 S.E.2d at 760.

114 *Id.* (quoting State *ex rel.* Thompson v. Morton, 84 S.E.2d 791, 800–01 (W. Va. 1954) (holding that the delegation by the Legislature of the power to remove an appointee from office to the Governor is not an unconstitutional violation of Art. IV, § 8 of the West Virginia Constitution)).

115 State *ex rel.* McGraw v. Burton, 569 S.E.2d 99 (W. Va. 2002).

116 The West Virginia Constitution provides that officers of the executive department "shall perform such duties as may be prescribed by law." W. VA. CONST. art. VII, § 1. Accordingly, the West Virginia Legislature has prescribed the duties of the Attorney General. For example, the Legislature requires the Attorney General to provide legal services, upon written request, to:

constitutional executive officers and the state's legislature to block encroachment on the core functions of the office."[117] In addition, the Legislature has repeatedly attempted to "emasculate the Attorney General's authority by transferring her responsibility to others in government."[118] The litigation concerning the constitutionality of the common agency practice of hiring legal counsel outside the realm of the Attorney General's office is a good example.[119]

In 2002, Attorney General Darrell McGraw filed a mandamus lawsuit directly in the Supreme Court of Appeals alleging that executive branch agencies and officials violated the West Virginia State Constitution by using lawyers who were not employed or approved by his office.[120] In addition, Attorney General McGraw asserted that the separation of powers doctrine is violated whenever the Legislature authorizes the provision of legal services to a state agency by a lawyer not employed by or with the consent of the Attorney General because the office is "stripped of its inherent functions."[121] McGraw pleaded that because of continuing legislative action aimed at diminishing his

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> the governor, secretary of state, auditor, state superintendent of schools, treasurer, commissioner of agriculture, board of public works, tax commissioner, commissioner of banking, adjutant general, commissioner of division of energy (now the division of environmental protection), superintendent of public safety, commissioner of public institutions, road commission, commissioner of the bureau of employment programs, public service commission, and any other state officer, board, or commission, or the head of any state educational, correctional, penal, or eleemosynary institution.

W. VA. CODE § 5-3-1 (2005). The Attorney General is also bound to provide the following legal services: written opinions and advice on questions of law; prosecution and defense of suits, actions, and other legal proceedings; generally rendering and performing all other legal services; and rendering to the President of the Senate and/or the Speaker of the House of Delegates a written opinion or advice upon any written questions submitted to him by either or both of them. McGinley, *supra* note 49, at 726.

The Attorney General must provide other additional and numerous legal services for the state. These services include appearance as counsel for the state in all causes pending in the Supreme Court of Appeals in which the state is interested, appearance as counsel for the state in all causes in any federal court in which the state is interested, and appearance in any cause in which the state is interested that is pending in any other court in the state, all upon the written request of the Governor. *Id.* at 726–27.

[117] *Id.* at 723.

[118] *Id.*

[119] It is important to note that in 1932, the Legislature amended the pertinent section of the West Virginia Code to prohibit expenditure of public funds for legal services provided by any private person, firm, or corporation. While generally prohibiting the hiring of private lawyers to provide legal services for the state, the Legislature has provided for the appointment of assistant Attorneys General to the extent necessary to assist in performing the duties of the office of Attorney General. These assistants serve at the pleasure of the Attorney General. *Id.* at 725–26.

[120] *McGraw*, 569 S.E.2d at 103.

[121] *Id.* at 110.

role, his office was quickly becoming "de facto non-existent."[122] On the other hand, counsel for the respondents[123] argued that the constitutional text stating that the executive officers "shall perform such duties as may be prescribed by law," combined with the lack of other specific constitutional language as guidance, grants the Legislature unfettered discretion to "delineate, limit, or even effectively eliminate the Attorney General's role in providing legal counsel and representation to State entities."[124]

The Supreme Court of Appeals concluded that "both sides [overreached] in their assertions."[125] In a classic example of functionalism, the court highlighted the fact that the principle of separation of powers called for "respectful cooperation and coordination" within the divided executive branch and between the executive and legislative branches.[126] In the court's unanimous opinion authored by Justice Larry Starcher, it identified two aspects of the separation of powers doctrine as being presented in the case:

> One aspect is the constitutional inability of the Legislature to define the powers and duties of the Office of Attorney General and the other constitutional offices so as to deprive the Office of Attorney General, or any of the other constitutional offices, of the inherent functions and purposes thereof. The second aspect is the maintenance of the concept of an executive branch that is itself divided among the several constitutional offices provided for in the Constitution, each with a separate, distinct, and vital contribution to be made to the operation of the executive branch.[127]

The court held that the employment of outside legal counsel without the consent of the Attorney General's office is not barred in all cases, but that the office cannot be stripped of its "inherent core functions."[128] The court invited

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122 *Id.* at 104.

123 The respondents in this case were numerous executive branch officials, directors of agencies, and cabinet secretaries. The court did not distinguish each of them in its opinion and thus, for analytical purposes, they will not be distinguished here.

124 *McGraw,* 569 S.E.2d at 105.

125 *Id.* at 106.

126 *Id.* at 116.

127 *Id.* at 109.

128 *Id.* at 103. The court noted that:

> the inherent constitutional functions of the Office of the Attorney General of the State of West Virginia include: (1) to play a central role in the provision of day-to-day professional legal services to State officials and entities in and associated with the executive branch of government; (2) to play a central role in ensuring that the adopting and assertion of legal policy and positions by the State of West Virginia and State entities, particularly before tribunals, is made only after meaningful consideration of the potential effects of such legal pol-

all parties involved to review the hiring practices of legal counsel to comply with its opinion in furtherance of "long-standing expressions of constitutional purpose and public policy."[129] The justices strove to balance the everyday workings of governmental entities, the framework of the Constitution, and current legislation in an atmosphere where the parties could "resolve any [sic] remaining issues outside the judicial forum."[130]

D. State *ex rel.* West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee[131]

One of the most recent, and most controversial, cases where the Supreme Court of Appeals examined a separation of powers issue stemming from an agreement made through the political process occurred in May 2003. Several Northern Panhandle legislators attempted to convince the Legislature to provide funding for specific economic development projects through the sale of revenue bonds to be repaid through West Virginia Lottery proceeds.[132] One of the proposed projects called for the renovation of buildings in downtown Wheeling to construct a Victorian-themed retail outlet center.[133] The Legislature subsequently created the West Virginia Economic Development Grant Committee ("Grant Committee") to set criteria for considering the projects submitted for consideration.[134]

One of the disputes in the case concerned the statutory method for selecting the membership of the nine-person Grant Committee.[135] The relevant statute provided that the committee would be comprised of the following individuals:

> icy and positions on the full range of State entities and interests; (3) to assure that a constitutional officer who is directly elected by and accountable to the people may express his legal view on matters of State legal policy generally and particularly before tribunals where the State is a party.

Id. at 115–16.

129 *Id.* at 116.

130 *Id.* at 120 (Kaufman, J., concurring).

131 State *ex rel.* W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm., 580 S.E.2d 869 (W. Va. 2003).

132 *Id.* at 874.

133 *Id.*

134 *Id.* The four-part standard used in evaluating the projects was the following: (1) the ability of the project to leverage other sources of financing; (2) job creation and retention; (3) promotion of economic development in the region; and (4) whether the project is in the public interest of the State. *Id.* The legislation provided that once the Grant Committee selected and certified a list of projects, the list was not subject to alteration other than by legislative enactment. *Id.*

135 *Id.*

> [t]he governor, or his or her designee, the secretary of the department of tax and revenue, the executive director of the West Virginia development office, three persons appointed by the governor from a list of five names submitted by the president of the West Virginia senate, and three persons appointed by the governor from a list of five names submitted to the governor by the speaker of the West Virginia house of delegates.[136]

Prior to the lawsuit, the Grant Committee completed its work pursuant to the original legislative enactment and certified more than thirty-five projects to receive funding.[137] The Legislature's involvement in identifying the list of potential committee members, however, initiated the separation of powers challenge by the West Virginia Citizens Action Group ("CAG").[138] CAG filed suit on September 3, 2002, seeking writs of mandamus and prohibition arguing that the appointments made to the Grant Committee were unconstitutional because the legislation providing for the legislative leadership to submit a list of names to the Governor ran afoul of the Governor's appointment powers.[139]

The Kanawha County Circuit Court found no constitutional defects in the appointment process or the legislation authorizing the Grant Committee's actions.[140] CAG appealed the lower court's ruling and the Supreme Court of Appeals reversed in part, holding that the appointment mechanism violated the separation of powers provision of the West Virginia Constitution.[141] In its appeal, CAG argued that the Legislature, acting through the Speaker of the House and President of the Senate, crossed a "clearly demarcated line intended to separate the executive branch from the legislative branch of state government."[142] Moreover, CAG maintained that the Grant Committee legislation improperly authorized the Legislature to "invade the province of the executive branch of government."[143]

In a shift from the functional reasoning employed in some of the court's prior cases, the Supreme Court of Appeals engaged in formalist line-drawing by attempting to methodically place the responsibilities of the three branches of government into separate categories.[144] Justice Joseph Albright quoted *State ex*

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136 *Id.* at 874 (quoting W. VA. CODE § 29-22-18a(d)(3) (2002)).

137 *Id.* at 874–75.

138 *Id.* at 874.

139 *Id.* CAG also argued that the revenue bonds were an unconstitutional incurrence of debt that required voter approval. This Note will address only the separation of powers facet of the case.

140 *Id.* at 875.

141 *Id.*

142 *Id.* at 876.

143 *Id.*

144 *Id.* at 876–77.

rel. Barker v. Manchin[145] when writing, "[g]enerally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law."[146] In addition, Albright noted that "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."[147]

The court held that the Grant Committee fell within the realm of the executive branch because the committee was charged with implementing specific legislation.[148] Thus, and more specifically, a majority of the court held that the legislation providing for the legislative leadership to submit a list of names to the Governor for possible appointment to the Grant Committee was an unconstitutional violation of separation of powers because it encroached on the executive power of appointment.[149] Shortly after the court's ruling in the case, the Legislature reconstituted the Grant Committee to comply with the court's opinion and provided then-Governor Bob Wise with the sole authority to appoint the members of the Committee.[150]

E. Summary

The preceding discussion describes the varying ways the Supreme Court of Appeals has approached separation of powers cases concerning aspects of the political process. These cases are modern illustrations of both the classic formalist approach utilized in the *Barker* and *Grant Committee* cases, and the more flexible analysis displayed in *Rice* and *McGraw*. As a practical matter, the court's lack of consistent guidance for litigating these types of cases arguably could result in the invalidation of widely supported laws and "inter-branch" agreements with greater frequency than cases upholding similar political compromises. This possible trend would not necessarily be the result of bad judging or even the product of an "activist" court. As Zasloff remarks, this controversy is instead derived from the "incoherence" of the state separation of powers doctrine itself, which "generates problems rather than solving them."[151]

Professor Zasloff attributes the lack of consistency by courts in this area to the recurring problem of interpreting executive power, "which lies at the heart of separation of powers concerning the structure of the administrative state."[152]

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145 *See supra* notes 85–102 and accompanying text (discussing the facts and holding of this case in detail).

146 *W. Va. Citizens Action Group*, 580 S.E.2d at 877 (quoting *Barker*, 279 S.E.2d at 631)).

147 *Id.* at 878 (quoting Springer v. Gov't of Philippine Islands, 277 U.S. 189 (1928)).

148 *Id.*

149 *Id.* at 881.

150 Phil Kabler, *Wise Reappoints Grant Committee, with One Change*, CHARLESTON GAZETTE, July 10, 2003, at 7A.

151 Zasloff, *supra* note 30, at 1087.

152 *Id.* at 1095.

This fact was particularly evident in the cases dealing with the Legislative Rule-Making Review Committee[153] and the Grant Committee.[154] In comparison to the federal level, "formalists argue that because the President holds the 'executive power,' Congress has strict limits on how it can structure the 'executive branch' of government."[155] Defining what "executive power" means, however, is still practically impossible at both levels of government.[156] Zasloff goes on to point out that:

> This hardly means that constitutional interpreters should give up construing the contours of the powers of the Legislature, or the Governor, or Congress, or the President, or even the courts themselves. Rather, it means that they must look at the concrete institutions themselves to determine what the contours of those powers might be. The point is to determine, for example, what the President can do, or what the Governor can do, not what is in the core function of the "executive." Attempting the latter brings us into hopeless abstractions.[157]

The section that follows describes the modern West Virginia Governor's Office for the context necessary to set forth a theory on deciding separation of powers cases when his Office is involved.

V. THE GOVERNOR'S OFFICE IN WEST VIRGINIA: A MODERN PERSPECTIVE

The West Virginia Constitution states that the "chief executive power shall be vested in the [G]overnor, who shall take care that the laws be faithfully executed."[158] Professor Robert Jay Dilger has remarked that "the Governor is

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153 *See supra* notes 85–102 and accompanying text (discussing the facts and holding of this case in detail).

154 *See supra* notes 131–150 and accompanying text (discussing the facts and holding of this case in detail).

155 Zasloff, *supra* note 30, at 1095–96; *see also* Morrison v. Olson, 487 U.S. 654, 697 (1987) (Scalia, J., dissenting) (quoting the Massachusetts Constitution of 1780 which stated "[i]n the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 543 (1994) (stating "conventional wisdom insists that the Framers believed in a hierarchical executive branch, with the President in charge of all administration of the laws").

156 Zasloff, *supra* note 30, at 1096.

157 *Id.*

158 W. VA. CONST. art. VII, § 5.

the central figure in West Virginia's political system."[159] He is expected to establish a legislative agenda through the preparation of the executive budget and "actively participate in the legislature's deliberations both on budgetary matters and state policy initiatives."[160] Moreover, state executive departments expect the Governor to "establish administrative goals and implementation strategies and the citizens expect the governor to provide political leadership and guidance."[161] Commentators and political science scholars have examined the "institutional" powers of the state's Chief Executive to determine if the Governor has the necessary resources to accomplish what West Virginia voters elect him to do.[162]

Professor Dilger generally describes the office of Governor in the following way:

> Individuals interested in altering the social and economic conditions existing in American society recognized that state governments had become viable mechanisms to achieve those goals. This elevated the stature of state government service as a career goal. Moreover, at the same time state governments become more important and state government service became more attractive to those seeking power, reformers were transforming the governor's office in many states from that of a symbolic figurehead to a powerful chief executive whose powers rivaled and, in some instances, surpassed the powers of the state legislature. Gubernatorial terms were lengthened, veto powers were expanded . . . appointment and removal powers were strengthened, control over the budget was centralized and reorganization powers expanded.[163]

The movement to strengthen the executive branch did not pass over West Virginia. In fact, a recent comparative study of the governors of the fifty states ranked West Virginia's Governor as the most powerful in the United States.[164] West Virginia received the top power rating because of the Governor's authority over the state budget, line item veto power, and tenure poten-

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159 Robert Jay Dilger, *The Governor's Office in West Virginia*, *in* WEST VIRGINIA'S STATE GOVERNMENT: THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES 27 (Institute for Public Affairs, 1993).

160 *Id.*

161 *Id.*

162 *See* Thad Beyle, *Gubernatorial Power: The Institutional Power Ratings for the 50 Governors of the United States*, 2005, *available at* http://www.unc.edu/~beyle/gubnewpwr.html (this widely cited gubernatorial power study provides a framework for measuring the influence governors have on their states' policies).

163 Dilger, *supra* note 159, at 30.

164 Beyle, *supra* note 162.

tial.[165] The state's Chief Executive, however, did not always garner the distinction of being the most powerful. The Office in its current form dates back to the passage of the Modern Budget Amendment in 1968 and the Governor's Succession Amendment in 1970. The focus of Part V will be on the "institutional" powers of the Office that most often are implicated in separation of powers cases involving the Governor.

A. *Institutional Powers*

In 1968, West Virginia voters approved a state constitutional amendment that strengthened the Governor's budgetary powers.[166] The Modern Budget Amendment, with a few exceptions,[167] placed the power to prepare the state budget solely with the Governor.[168] It also empowered the Governor to determine the state government's projected revenues for each fiscal year and prohibited the Legislature from appropriating funds in excess of that amount without gubernatorial approval.[169]

In 1970, voters approved the Governor's Succession Amendment, which permitted a governor to serve two consecutive four-year terms.[170] This law reduced the likelihood of the Governor being perceived as a "lame duck" during the third and fourth years of his first term in office.[171] As Dilger notes, this development "strengthened the Governor's bargaining power with both the state legislature and with other political organizations interested in influencing the direction of state government policies."[172]

Nonetheless, as mentioned in Part II, the Governor of West Virginia, like most governors nationwide, is a "plural executive" and thus shares execu-

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165 Stevenson Swanson, *Governors' Powers Ranked; Illinois Ties at 4th in Rating Clout of State High Offices*, CHI. TRIB., Sept. 2, 2001, at 10C.

166 Dilger, *supra* note 159, at 30.

167 The exceptions are that both the legislative and judicial branches prepare their own budgets and those cannot be changed by the Governor. *See* State *ex rel.* Brotherton v. Blankenship, 207 S.E.2d 421, 424 (W. Va. 1973) (holding that the Governor does not possess authority under the Modern Budget Amendment to disapprove or veto items enacted by the Legislature in the Budget Bill that relate to the judiciary and legislative departments).

168 Dilger, *supra* note 159, at 30.

169 *Id.* The Legislature may, however, enact supplemental appropriations in excess of the Governor's projected revenues if the legislation includes the means for raising the additional revenue. Finally, and as will be noted *infra*, the Modern Budget Amendment also gave the Governor the line-item veto power. When confronted with the issue, the Supreme Court of Appeals of West Virginia has interpreted the scope of this veto power broadly. *See, e.g.*, *Brotherton*, 207 S.E.2d at 424 (holding that for nearly all budget items, the Governor can essentially delete spending designations and substitute his own).

170 Dilger, *supra* note 159, at 30.

171 *Id.*

172 *Id.* at 30–31.

tive power with five other constitutionally elected offices.[173] Despite having a "plural executive," West Virginia adopted a sweeping executive branch reform initiative in 1989 that expanded the Governor's control over state agencies.[174] Instead of dealing directly with more than 100 departments and countless boards and commissions, the Governor now leads a reorganized executive branch with department heads that possess the title of "Secretary," similar to the President's Cabinet.[175] These agencies include the Departments of Administration, Commerce, Education and the Arts, Environmental Protection, Health and Human Resources, Military Affairs and Public Safety, Revenue, and Transportation.[176] The department heads comprise the Governor's Cabinet and report directly to him.

Another element of institutional control possessed by the Governor is the power of appointment. This power has been the subject of litigation.[177] In West Virginia, all non-elected officials are appointed by the Governor and confirmed by a majority of the Senate.[178] The Legislature, by statute, also may provide for a gubernatorial appointment that does not require Senate confirmation.[179] Again, however, the separation of powers doctrine prohibits the appointment of state officers by the Legislature.[180]

One commentator has suggested that a governor's power to persuade the state legislature is enhanced if his or her veto power is strong.[181] For example, in some states, the governor can force a compromise merely by threatening to veto a bill because of the difficulty in overriding one.[182] West Virginia's

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173 *Id.* at 31–32. It is worth noting that West Virginia is one of only a handful of states that does not have the elected office of Lieutenant Governor. In lieu of this separate constitutional office, the Legislature, by statute, added the ceremonial title of Lieutenant Governor to the President of the State Senate. Nonetheless, if there is a vacancy in the office of Governor, the Senate President still becomes Governor. *Id.* at 32.

174 *Id.* at 36. After he took office in 1989, Governor Gaston Caperton initially proposed a constitutional amendment that would have eliminated the "elected" offices of all members of the executive branch with the exception of the Governor and Attorney General which would have effectively converted the Governor into a "unitary executive" similar to the President of the United States. West Virginia voters overwhelmingly rejected this original proposal which led to this more modest, yet still comprehensive, reorganization of state government. *Id.* at 33.

175 *Id.* at 36.

176 W. VA. BLUE BOOK, *supra* note 51; Dilger, *supra* note 159, at 36.

177 *See, e.g., W. Va. Citizens Action Group*, 580 S.E.2d at 869 (holding that a statutory scheme which provided for the President of the Senate and Speaker of the House of Delegates to submit a list of names to the Governor for possible appointment was an unconstitutional violation of separation of powers).

178 BASTRESS, *supra* note 12, at 192.

179 *Id.*

180 *Id.* Article VII, Section 8 of the West Virginia Constitution makes this explicit by stating that "no such officer shall be appointed or elected by the Legislature."

181 Dilger, *supra* note 159, at 46.

182 *Id.* at 46–47.

Governor possesses very strong veto power because he has the authority to employ both the line item veto[183] and the reduction veto.[184] The Legislature, however, may override the Governor's ordinary veto by a simple majority vote in both houses; and if the Governor vetoes any part of the budget bill, a two-thirds vote of both houses is required to override the veto.[185]

Although the Governor of West Virginia possesses relatively strong institutional powers on paper, history demonstrates that the personal resources of a particular Governor ultimately determine the success of a particular administration.

B. Historical Context

West Virginia has had six governors since the passage of the watershed Modern Budget Amendment in 1968: Arch Moore (1969-1977, 1985-1989), John D. "Jay" Rockefeller (1977-1985), Gaston Caperton (1989-1997), Cecil Underwood (1997-2001), Bob Wise (2001-2005), and Joe Manchin (2005-present).[186] However, of all the governors in the modern era, none did more to consolidate the power of the office and define the position in the minds of the public than Arch Moore.[187] Political observers throughout the state agree that Moore "shaped the office in a way no other governor has."[188]

As years passed, each Chief Executive who followed Moore exercised powers and exerted privileges that he originally carved out.[189] However, Rockefeller's "ambitions,"[190] Caperton's "unwieldy governing coalition,"[191] and Underwood's "tenuous political position,"[192] collectively left the Governor's Office

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[183] This particular veto allows the Governor to reject an individual item in an appropriations bill. *Id.* at 47.

[184] This veto involves the reduction of a specific appropriation without eliminating the individual item in the appropriations bill. *Id.*

[185] COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2006, 156 (Table 4.4) (2006).

[186] W. VA. BLUE BOOK (Darrell E. Holmes ed., vol. 87, 2005).

[187] Chris Stirewalt, *Joe, Arch and the Very Special Session*, THE STATE JOURNAL, Jan. 19, 2006, at 30.

[188] *Id. See also* BRAD CROUSER, ARCH: LIFE OF GOVERNOR ARCH MOORE, JR. (2006) (this book is the first authorized biography of Governor Moore, a six-term Congressman and three-time governor, that offers fascinating details about the life of one of West Virginia's most debated political figures).

[189] Stirewalt, *supra* note 187, at 30.

[190] *Id.* After Jay Rockefeller completed two consecutive terms as Governor, he was elected to the United States Senate, where he currently serves.

[191] *Id.* In both his gubernatorial campaigns in 1988 and 1992, Governor Caperton attempted to bring numerous opposing interest groups together under the umbrella of moving West Virginia forward and achieving common goals.

[192] *Id.* In his second term as a Republican from Cabell County, Governor Underwood faced a Legislature controlled by Democrats. On one hand, this fact arguably presented challenges to his public policy agenda; on the other hand, some have opined that Underwood simply acquiesced to

in a precarious political situation when compared to the Legislature.[193] Only in 2001, when Bob Wise took office, did the Governor begin to reassert power that was rightfully his under the state Constitution.[194] For example, Governor Wise used executive orders to implement policy objectives such as freezing the State's six-percent sales tax on mobile homes and some construction materials to help residents and businesses rebuild after widespread flooding in Southern West Virginia in 2001 and 2002, and banning gambling and casino-related words from signs advertising video lottery parlors.[195]

All indications are that the inauguration of Joe Manchin, III, as Governor in January 2005 and the events of his first two years in office will keep the power of the Governor's Office strong. With that in mind, the possibility of unique legal issues confronting the Supreme Court of Appeals remains high as Governor Manchin seeks to exercise the powers of his office in unique ways. Some of the current issues facing the administration could involve future separation of powers questions as the political branches of state government pursue innovative solutions to some of West Virginia's lingering problems.

C. *The Current Chief Executive: Governor Joe Manchin, III*

In January 2005 and only days after taking office as West Virginia's 34th Governor, Joe Manchin, III, proposed a bold set of policy initiatives during a special legislative session.[196] He focused on three main issues. The first dealt with consideration of a lengthy, complex and controversial measure to pay down $3 billion in workers' compensation unfunded liabilities and eventually privatize the state-run system.[197] In addition, the Governor proposed legislation intended to strengthen the state's governmental ethics law by imposing tougher financial disclosure requirements and restoring the Ethics Commission's authority to initiate investigations of possible ethics violations.[198] The third major piece of legislation was a far-reaching government reorganization bill that

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the Legislative Branch and permitted its leadership to basically run the State from 1997 until 2001.

193 *Id.*

194 *See* Lawrence Messina, *Manchin Flexes Muscle with Gas Tax Freeze Order*, CHARLESTON GAZETTE, Nov. 28, 2005, at 1C; *Executive Order: Who's in Charge?*, THE STATE JOURNAL, Sept. 15, 2005, at 26 (commenting on the precedent Governor Wise set by issuing executive orders and its effect on the legality of actions taken by future governors).

195 Telephone Interview with Bob Wise, Former Governor of West Virginia and current President of the Alliance for Excellent Education in Washington, D.C. (Jan. 12, 2006).

196 Editorial, *Dynamic Bold Start of Term*, CHARLESTON GAZETTE, Feb. 1, 2005, at 4A.

197 Phil Kabler, *Manchin Agenda Passes; Legislature Approves Comp, Ethics Measures*, CHARLESTON GAZETTE, Jan. 30, 2005, at 1A.

198 *Id.*

placed eight previously autonomous agencies under the control of the Governor.[199]

Each of the Governor's proposals passed during the special session, prompting the *Charleston Gazette* to remark that Manchin "achieved more in his first two weeks in office than many governors attain in two four-year terms."[200] Some would argue Manchin's success came from his personal qualities, such as having a knack for political compromise, just as much as it had to do with the broad-based coalition of interest groups he brought together during the gubernatorial campaign the previous year. These political successes translated into very high public approval ratings,[201] which certainly have a sizable impact on the Governor's ability to exercise power. After a little more than a year in office, Governor Manchin held the distinction of arguably being the most popular governor in the nation.[202]

One example where the Governor has blazed a new trail is the area of budget preparation. Manchin required the State Budget Office to assemble West Virginia's budget in a more "businesslike manner" to take into account the savings achieved from initiatives aimed at making state government more efficient.[203] Moreover, the Governor maintained that the best way to manage the state's growth is to implement a five-year financial plan that illustrates the factors driving future costs and expenses incurred by state government.[204]

Another area of potential change may be in the administration of the Governor's Civil Contingency Fund, a fund intended to allow governors to provide funding to municipalities in emergencies and for other special projects.[205] In addition, legislators passed House Bill 4019 during the 2006 Legislative Ses-

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199 *Id.* The government reorganization bill approved during the special session renamed the Bureau of Commerce the Department of Commerce and encompassed all the divisions, offices, boards and commissions under the former Bureau, with the exception of the Water Development Authority and the Economic Development Authority, which became independent. The legislation also established the Governor as Chairman and as a board member for seven agencies: the Economic Development Authority, the Public Energy Authority, the Water Development Authority, the Jobs Investment Trust, the Infrastructure Council, the Housing Development Authority and the School Building Authority. With this reorganization, the Council for Community and Economic Development, which provided oversight for the West Virginia Development Office, became an advisory board. The executive director of the Development Office, who is appointed by the Governor, assumed the oversight duties formerly exercised by the Council. *Id.*

200 *Dynamic Bold Start of Term*, *supra* note 196.

201 Kris Wise, *Manchin Tops in Popularity: Governor the Nation's Favorite, Reports Poll of Residents in 50 States*, CHARLESTON DAILY MAIL, Jan. 25, 2006, at 1A.

202 *Id.*

203 Juliet Terry, *Manchin Taking New Budget Approach: Governor's Staff Say Financial Plan Will Have More 'Transparency'*, THE STATE JOURNAL, Dec. 23, 2005, at 9.

204 *Id.*

205 Phil Kabler, *Bill To Kill Digest Nears Approval: Lawmakers will Find Other Funding Routes, Senator Says*, CHARLESTON GAZETTE, Feb. 22, 2006, at 1C.

sion eliminating the "Budget Digest,"[206] the document that expresses the legislative intent about how to spend varying line items in the state budget.[207] One option to replace the digest is to transfer the authority for distributing these funds to the executive branch, either through the West Virginia Development Office or the Governor's Office directly.[208] These examples are just a couple of instances where gubernatorial power in budget preparation may become an issue in the future. In fact, the Legislature already has shown the propensity to challenge the Governor's authority to implement creative budgeting techniques in the name of state government "efficiency."[209]

At the conclusion of the 2006 regular session, the Legislature passed Senate Bill 125, the state budget for the next fiscal year. The bill contained the following language:

> In vesting the power of the purse with the Legislature, the founding fathers recognized the inherent political nature of budgeting and established the Legislature to function as a crucible for the venting and vetting of political tensions and ideas, the improvement of good ideas and the imperilment of bad ones . . . [u]nchecked and unlimited executive authority to modify the State budget . . . would not lend to minimizing waste, reduc-

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[206] The concept of the Budget Digest could occupy an entire volume of legal scholarship itself and is beyond the scope of this Note. Prior to the passage of HB 4019, after the Governor signed the budget bill, it became the official budget of the state for the upcoming fiscal year. However, the Legislature's role in the budget process was not completely finished. Just as the Governor submits the budget document along with the official budget bill in order to spell out certain details, the Legislature developed what is called the "Digest of the Enrolled Budget Bill" to present executive agencies with the intent of the Legislature on some of the details of the budget. This is where the Legislature suggested to agencies how it believed the agencies should spend its appropriations. The budget digest was written after the legislative session concluded by the staff of the Finance Committees and Legislative Auditor's office, with the approval of the members of the Budget Conference Committee. The budget digest process had been the subject of much litigation over the years. *See* Common Cause of W. Va. v. Tomblin, 413 S.E.2d 358 (W. Va. 1991) (holding that the Budget Digest process is not an unconstitutional "delegation of power by the whole Legislature to a committee of the Legislature because the digest summary . . . does not have the force and effect of law"); State *ex rel.* League of Women Voters of W. Va. v. Tomblin, 550 S.E.2d 355 (W. Va. 2001) (holding that the Budget Digest process does not violate the separation of powers clause and reaffirming the court's prior holding that the digest summary lacks the force and effect of law); State *ex rel.* Podelco v. Tomblin, No. 31793 (W. Va. 2004) (this most recent case challenging the constitutionality of the Budget Digest was dismissed by the court in April 2006 after the Legislature enacted HB 4019 that effectively eliminated the digest summary).

[207] Phil Kabler, *Digest Near Death: Governor Is Expected To Sign Bill*, CHARLESTON GAZETTE, March 3, 2006, at 1A.

[208] The Legislature has the option of including items that would have traditionally been in the budget digest in the actual budget bill. If this were the case, however, the Governor could exercise his veto power to control this spending.

[209] *See* S.B. 125, 77th Leg., Reg. Sess. (W. Va. 2006) (approved by the Governor with objections).

> ing spending and . . . would circumvent the fundamental Constitutional design embodied in the doctrine of separation of powers, the budget process itself and the protections provided within the Legislature's architecture. Even more fundamentally, such approach would serve to erode the very delegation of democracy.
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> . . . For these and other reasons the Governor's proposed method for rededicating monies saved due to efficiencies is hereby declined.
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> . . . .
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> . . . The Constitution vests the power of the purse, the power to appropriate public funds, solely in the legislative branch of this State's government. The inclusion of more specific line-items in an appropriations bill is a means by which the Legislature effectively decreases items of appropriation proposed by the executive for other purposes . . . It is the intent of the Legislature to resist any encroachment of the power to appropriate devolved upon and entrusted to the legislative branch by the citizens of this State through their Constitution.[210]

Governor Manchin approved Senate Bill 125 but rightfully objected to the above language because it could be interpreted to limit his constitutional authority to veto items in the budget. Through the authority outlined in Article VI, Section 51 of the West Virginia Constitution, the Governor deleted the entire section in the budget bill containing this language because it improperly minimized and unduly limited the role of the Executive Branch in formulating the state budget.[211] In his letter to the Legislature expressing his objections, the Governor noted that:

> [e]ach [executive] department and agency, through budget hearings and in the expertise that each possess in implementing the mandates established by the Legislature, provide invaluable insight to the budgeting process that cannot be minimized or ignored. Moreover, the Constitution grants the Governor significant powers in providing vetoes for items or parts of items of the budget.[212]

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210 *Id.*

211 Letter from Governor Joe Manchin, III, to Secretary of State Betty Ireland (Mar. 24, 2006), http://www.wvbudget.gov/veto2006.pdf.

212 *Id.*

Finally, Governor Manchin's short time in office has not escaped criticism entirely, nor have the state's fortunes been completely rosy.[213] On June 25, 2005, West Virginia voters overwhelmingly rejected a Manchin-proposed constitutional amendment that would have authorized the sale of $5.5 billion in bonds to refinance the state's unfunded liabilities in the teachers, judges and state police retirement systems. State leaders also have had to respond to the prospect of job cuts at a steel mill in the Northern Panhandle and at an automotive stamping plant in South Charleston. Finally, the month of January 2006 will not soon be forgotten by West Virginians as the state endured the deaths of sixteen underground coal miners in accidents at the Sago Mine in Upshur County, the Alma Mine in Logan County, and the Aracoma Mine in Boone County. The Administration, along with the Legislature, however, worked tirelessly to enact new mine safety laws in response to these tragic accidents.[214]

D. Summary

There will always be those who resist changes in government; those that wish to preserve the status quo. This fact begs the question of not if, but when, the authority exercised by the executive branch will be subject to a separation of powers challenge? It follows that lawyers both inside and outside state government deserve a roadmap for understanding how these legal issues are likely to be decided by the Supreme Court of Appeals. Unfortunately, the legal landscape in this area remains clouded. The following section suggests a theory of separation of powers that the Supreme Court of Appeals should consider. At the very least, it aims to reinvigorate the debate in this area that ultimately will lead to a clearer path for anyone seeking to litigate these controversial, yet extremely important cases.[215]

VI. BETTER POLICY, NOT BETTER POLITICS: AN ARGUMENT FOR A MORE FUNCTIONAL & DEFERENTIAL APPROACH TO THE CHIEF EXECUTIVE

> *"We are left, then, with a principle that is textually anomalous, historically ungrounded, and normatively suspect."*[216]

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[213] *See, e.g.*, Lawrence Messina, *Big League Consultants Hired by Manchin*, CHARLESTON GAZETTE, Sept. 26, 2005, at 1A (commenting on the increased scrutiny being paid to budget requests for out-of-state government consultants).

[214] Tom Searls, *Mine Safety Legislation Passes; Bill Requires Rapid Reporting of Accidents, Tracking Devices, Portable Air Supplies in Mine*, CHARLESTON GAZETTE, Jan. 24, 2006, at 1A.

[215] The last fifteen years have witnessed an increase in scholarship on state constitutional law. In fact, the field has its own casebook. *See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (4th ed. 2006) (this "text explores the many common themes that appear in the body of constitutional law of all states and focus[es] on the importance of the unique language and judicial interpretation of state constitutions in resolution of specific issues").

[216] Zasloff, *supra* note 30, at 1128 (emphasis added).

At first glance it may seem contrary to first observe a theory of federal separation of powers in contemplating such a theory for West Virginia. However, a critical component of analyzing separation of powers issues is explaining why such standard "federal" theories are almost always inapplicable to the states.[217] In his influential functionalist theory of federal separation of powers, Peter Strauss formulates a checks and balances approach in which "it is not important how powers below the apex are treated; the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence."[218]

Strauss contends that courts "should determine whether a suitable balance of power exists between Congress and the President in the control" of a particular agency.[219] He justifiably suggests that "the U.S. Constitution vests the President with substantial control over administrative agencies even if [Congress] specifically says otherwise."[220] Strauss relies on two justifications for his argument:[221]

> First, the Appointments Clause establishes a reserve presidential power that Congress may not abrogate. Second, the Take Care Clause of the Constitution implies it, because "the President is to be a Unitary, Politically Accountable Head of Government"[222] and thus "the unitary responsibility . . . expressed, and sharply intended, does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally believe in that responsibility."[223]

Such considerations, however, would have little effect in West Virginia because, although the state Constitution contains a similar appointments clause, the executive branch is plural and thus the Governor shares executive power

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217 *Id.* at 1129–31.

218 Strauss, *Place of Agencies in Government*, *supra* note 57, at 578; *see also* Zasloff, *supra* note 30, at 1129–30. Professor Zasloff uses Strauss's theory to explain why standard functionalist theories for federal separation of powers issues cannot apply to the California Constitution.

219 Zasloff, *supra* note 30, at 1129.

220 *Id.*

221 *Id.*

222 Strauss, *Place of Agencies in Government*, *supra* note 57, at 599. Professor Zasloff asserts that Strauss relies heavily on this "unitary executive" argument because one of the most important and fundamental decisions made at the 1787 Constitutional Convention was "to vest the executive power [of the United States] in a single elected official, the President." Zasloff, *supra* note 30, at n.230 (citation omitted).

223 Strauss, *Place of Agencies in Government*, *supra* note 57, at 648–49 (citation omitted).

with other officers. Still, neither a strict formalist approach nor a general functionalist theory suffices in all cases.

A. *A Theory for West Virginia*

Instead, these issues require a more flexible approach. Professor Zasloff advocates an approach where, at the state level, the "separation of powers doctrine should [be highly deferential and] resemble a point midway between a functionalist theory and complete nonjusticiability."[224] Thus, "only in extraordinary circumstances should a court step in and overturn the decisions that the political branches have agreed upon."[225] This Note's proposal does not go quite that far. In West Virginia, a formalistic approach should be used only in extreme situations when dealing with specific textual references or powers traditionally identified with one branch of state government.

For example, the Legislature could not restrict the Governor's veto power or abolish his wide-ranging budgetary authority.[226] In other words, if a legislative enactment deprives another branch of a specifically enumerated power, then the act should be struck down by the Supreme Court of Appeals.[227] In almost every other circumstance, a functional approach will be more appropriate, especially when dealing with novel political arrangements or contexts in which the political branches enlist the modern administrative state.

B. *Practical Implications of the Theory*

As has been described, the policing of separation of powers serves significant purposes in our overall constitutional scheme.[228] However, "effective government sometimes requires the creative blending of different powers into complex political structures designed to solve the most difficult . . . problems."[229] Moreover, as Professor Andrew Spiropoulous asserts:

> . . . [T]he Framers of the Constitution themselves chose not to rest their structural scheme on a simple-minded, strict separa-

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224 Zasloff, *supra* note 30, at 1139.

225 *Id.*

226 In contrast, the same approach would apply if the Governor attempted to restrict or eliminate powers that are granted by the state constitution to other branches of government or to other elected officers. *See, e.g.*, State *ex rel.* Brotherton v. Blankenship, 207 S.E.2d 421 (W. Va. 1973). In the *Brotherton* case, the court was confronted with the issue of former Governor Moore attempting to eliminate, through his budgetary veto powers, almost the entire budget of a constitutional officer and also drastically reduced certain spending allocations for public education. The court emphatically held that such action violated separation of powers. *Id.*

227 Zasloff, *supra* note 30, at 1130.

228 Spiropoulos, *supra* note 15, at 330.

229 *Id.*

> tion. Rather, they concluded that unless the different branches are "connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."
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> . . . .
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> . . . The advent of the administrative state, for example, has led to the extensive blending of powers. It is difficult to imagine how the government can effectively engage in the kind of close regulation of labor or environmental conditions so common today, without the executive—or, what we might call today, the administrative branch of government—issuing rules that look very much like statutes or making decisions regarding alleged violations of these rules that appear to all the world as judicial.[230]

As Part V explained, the passage of the Modern Budget Amendment in 1968 and reforms to the executive branch in 1989 greatly strengthened the Governor's power over the administrative state in West Virginia. Thus, the Supreme Court of Appeals must respect the powers of the Governor's Office when asked to interpret cases implicating separation of powers, especially those involving innovative governmental arrangements. The reason should be obvious: so the structure and powers of the executive branch in West Virginia will ensure that the State benefits from effective governance.[231] Unfortunately, it is nearly impossible to predict future measures in order to appropriately test this theory. Recent actions taken by Governor Manchin, however, provide an opportunity to explain the importance of this Note's proposal to "real-world" issues and thus expand the discussion beyond simply academic and theoretical propositions.

1. Children's Health Insurance Program ("CHIP") Expansion

In April 2006, the Governor signed House Bill 4021, passed by the Legislature during the 2006 Regular Session, which purported "to expand health insurance to an estimated 4,000 West Virginia children."[232] Under the new law, children whose families make as much as 300 percent of the poverty level qualify for CHIP, an increase from the previous threshold of 200 percent.[233] None-

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230 *Id.* at 330–31 (citations omitted).

231 *See id.* at 328 (reflecting on the fact that structural flaws in the Oklahoma Constitution may prevent members of the executive branch from effectively governing the state).

232 Scott Finn, *Manchin Seeks Expansion Delay in Kids' Insurance: New Law Orders Health Coverage for 4,000 More W. Va. Children*, CHARLESTON GAZETTE, June 30, 2006, at 1A.

233 *Id.*

theless, uncertainty surrounding funding from Congress forced state leaders to engage in a balancing act aimed at expanding government health care for children while avoiding new budget problems. Congress is expected to reauthorize CHIP in 2007 and, until that time, the administration sought a delay in expanding the program from the CHIP board of directors.[234]

The question presented by this proposed action is: can the Administration accomplish this legally? The relevant sections of the new provision state:

> Upon approval by the Centers for Medicare and Medicaid Services, the board *shall* implement a program for uninsured children of families with income between two hundred and three hundred percent of the federal poverty level.
>
> . . . .
>
> Nothing in this section may be construed to require any appropriation of state general revenue funds for the payment of any benefit provided pursuant to this section, except for the state appropriation used to match the federal financial participation funds. In the event that the federal funds are no longer authorized for participation by individuals eligible at income levels above two hundred percent, the board *shall* take immediate steps to terminate the expansion provided for in this section and notify all enrollees of such termination.[235]

Some speculated that a delay in expanding the program of more than a few months could cause legal problems for the Governor.[236] Others asserted that the board of directors could wait a year or longer to expand CHIP.[237]

The least attractive option would require the Legislature to amend the provision expanding CHIP to explicitly permit executive discretion to manage the program in a fiscally responsible manner.[238] Another alternative stems from the fact that the Legislature recognized the uncertainty of federal appropriations when it provided for an immediate termination of the expansion if federal funding declines.[239] However, ambiguity in the term "shall" arguably permits the Governor to wait until Congress acts on the CHIP legislation.

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234 *Id.*

235 W. VA. CODE § 5-16B-6d (2005) (emphasis added).

236 Finn, *supra* note 232.

237 *Id.*

238 *See id.* (contemplating that the Governor could ask the Legislature to simply change the law).

239 Finn, *supra* note 232.

The Governor's Office and legislative leaders attempted to reach a compromise that likely will include a modest increase in CHIP eligibility until the State finds out whether the federal government will increase West Virginia's matching funds. Such action should be enough to quiet most legislative criticism while satisfying Governor Manchin's concerns about over-spending. Nonetheless, the prospect of individual legislators filing a lawsuit over the final decision is not out of the question.

While Congressional action would probably render moot any such suit, if confronted with such a petition, the Supreme Court of Appeals should employ a functionalist analysis that does not attempt to demarcate between the traditional branches of government and the CHIP board of directors, an administrative body within the executive branch. Moreover, this deferential approach would ensure that the political arrangement[240] between the Legislature and the Governor remains intact.

2. Gasoline Tax Increase

The high price of gasoline is certainly on the minds of most West Virginians. Drivers received some relief when Governor Manchin issued an executive order in November 2005 that stopped the state gasoline tax from automatically increasing on January 1, 2006.[241] The Legislature imposed the gas tax in 1983 to compensate for losses in revenue when drivers bought less gasoline when oil prices were high.[242] The tax revenue goes to the State Road Fund and pays for countless other services, including road construction and maintenance.[243]

A provision in the West Virginia Code ties the gasoline tax to the "average wholesale price of gasoline between July 1 and Oct[ober] 31 of the previous year."[244] The relevant sections of the Code provide the following:

> That the variable component [of the gas tax] shall be equal to five percent of the average wholesale price of the motor fuel . . . and is computed as hereinafter prescribed in this section.
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> . . . To simplify determining the average wholesale price of all motor fuel, the tax commissioner *shall* . . . determine the average wholesale price of motor fuel for each annual period on the

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240 *See* W. VA. CODE § 5-16B-6d (2005) (statute authorizing the CHIP board of directors to end the enrollment expansion if federal funding is no longer available).

241 Messina, *supra* note 194.

242 *Id.*

243 *Id.*

244 *Id.*

> basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October . . .
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> . . . .
>
> In any administrative or court proceeding brought to challenge the average wholesale price of motor fuel as determined by the tax commissioner, his or her determination is presumed to be correct and shall not be set aside unless it is clearly erroneous.[245]

State officials feared that Hurricanes Katrina and Rita in 2005 would skew the price of gasoline after the disruption of the Gulf Coast's oil industry.[246] In his order freezing the scheduled tax hike, Governor Manchin wrote:

> the spike in wholesale motor fuel prices caused by the unprecedented destruction of the Gulf Coast Hurricanes has significantly inflated the average wholesale price of motor fuel in West Virginia for the period of July 1, 2005 through October 31, 2005; and . . . this aberration of the single, statewide average wholesale price of motor fuel and its attendant perversion of the variable component of the excise tax on motor fuel for calendar year 2006 would undermine the economic health and welfare of the State and her citizens by distorting the rate of tax so as to visit an irrational and unfair result on West Virginia consumers.[247]

The Governor's decision effectively froze the tax because it ordered the Tax Commissioner, in calculating the average wholesale price, to disregard the price of gasoline between August 29, 2005 through October 31, 2005.[248] He "further order[ed] that the resulting average not exceed the prior year's."[249] With the price of gasoline continuing to climb and no sign of leveling off, the Governor must make a decision on whether to continue the freeze in 2007.[250] A more important question, however, for the purposes of this Note, is does the Governor have the power to issue such an order?

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245 W. VA. CODE § 11-14C-5 (2005) (emphasis added).

246 Messina, *supra* note 194.

247 Exec. Order No. 13-05, By the Governor (Nov. 23, 2005).

248 Messina, *supra* note 194.

249 *Id.*

250 Brian Farkas, *Manchin May Face Dilemma Over Gas Tax*, CHARLESTON DAILY MAIL, Aug. 26, 2006, at 5A.

As a general proposition, the State Constitution charges the Governor with faithfully executing the laws. And to be sure, the Governor lacks a textual basis that would permit him to "suspend" the gas tax statute. In this particular case, however, the Governor's order did not contravene the legislative enactment. Moreover, the statute establishes a minimum amount that the tax cannot go below but is silent with regard to any ceiling. Therefore, an argument can be made that the Governor acted within the scope of prior precedent and thus he possessed the inherent authority to stop the automatic increase of the gas tax.[251]

The State Road Fund relies almost exclusively on revenue from the gas tax, with some arguing that the continued loss in revenue will place the state highway program in a "crisis situation."[252] Litigation challenging the legality of the Governor's executive order is also not unthinkable, with the West Virginia Gasoline Dealers and Auto Repair Association or the Contractors Association of West Virginia as potential plaintiffs. For example, these organizations could argue that a lower gasoline tax means less revenue for construction jobs associated with road-building projects.[253] A functional approach is best in this case as well because the nature of the authority granted to the Tax Commissioner by the Legislature requires executive decision-making that should receive deference from the judiciary.[254]

C. *Summary*

A political leader striving to find inventive ways to solve recurring problems is not unique to West Virginia.[255] The purpose of this section, and this Note generally, is not to predict the outcome of possible cases similar to the ones mentioned herein but to focus attention on everyday applications of separation of powers in West Virginia and the importance the Supreme Court of Appeals will play in assessing whether West Virginia leaders can make the progress that the voters and citizens of the State so urgently desire. While skeptics might argue that this proposed framework represents an "abdication of the judiciary,"[256] this fear is unfounded. The cornerstone of the judiciary's traditionally deferential mentality comes from the recognition that political branches protect themselves through their own political power.[257]

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251 *See* Messina, *supra* note 194 (arguing that prior use of executive orders by Former Governor Wise authorized Governor Manchin to do the same).

252 Farkas, *supra* note 250.

253 *Id.*

254 *See* W. VA. CODE § 11-14C-5 (2005) (this statute charges the Tax Commissioner with calculating the average wholesale price of gasoline that is used to determine the applicable tax rate).

255 *See* articles cited *supra* note 15 (providing citations to articles discussing the various ways other states solve problems confronting the political branches of government and the separation of powers principles that follow).

256 Zasloff, *supra* note 30, at 1142.

257 *Id.*

VII. CONCLUSION

As Professor Friedelbaum describes, "the doctrine of separation of powers reveals parallels between national and state precedents."[258] However, "state contests affecting [separation of] powers appear relatively modest in their reach and impact when compared with the more compelling violations necessary to evoke intervention . . . by federal courts."[259] U.S. Supreme Court Justice Robert Jackson aptly described the notion of separation of powers "when he urged a workable integration of dispersed powers, creating a 'separateness but interdependence, autonomy but reciprocity.'"[260] In light of this concept, "courts have striven to achieve a viable balance and accommodation, when measured both in theoretical and practical terms."[261]

West Virginia's Governor is one of the most powerful in the country and possesses the institutional powers essential to implementing public policy. A comparative state-by-state analysis of executive branches, more specifically governorships, likely would validate this assertion, but such a result is not central to this proposal. Given the pervasive era of the administrative state today, West Virginia will be better served when the court stops drawing lines to delineate powers to a particular branch of government. This result undoubtedly would permit the Governor and his staff to manage an executive branch progressively more involved in the lives of ordinary citizens. The Mountain State has a strong Chief Executive for a reason. It also has a part-time, citizen Legislature for a reason. Fortunately for West Virginia's future, these two branches of government have become increasingly willing to shed the partisan politics that helped create some of the State's enduring problems in favor of a greater reliance on political compromise.

West Virginia faces numerous challenges in the very near future. These include issues concerning tax reform, civil justice reform, more flexibility and greater efficiency in state and local governance, practical approaches to health care delivery and education, and maximization of our energy resources. Tough decisions lie ahead for the State's political leaders. As these leaders search for answers in these and other public policy areas, they will certainly consider ways to "think outside the box" in tackling what seem to be recurring and never-ending problems. This notion should be welcomed.

One area where attention hopefully will not be focused is watching the Supreme Court of Appeals attempt to rein in the administration and undo carefully crafted political compromises. Finally, this proposed theory may not nec-

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258 Friedelbaum, *supra* note 6, at 1457.

259 *Id.* at 1457–58.

260 Id. at 1458 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

261 Friedelbaum, *supra* note 6, at 1458.

essarily yield clearer answers than before.[262] But as Zasloff argues, it is at least asking the right question:

> It is not a question susceptible of easy answer, because asking a court to determine a political balance of power is usually asking for trouble. "To acknowledge this, however, is merely to recognize an additional reason for the Court generally to leave the resolution of separation of powers disputes to the other branches and respect the compromises they hammer out."[263]

Jason C. Pizatella[*]

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[262] One inevitable problem with such a generalization regarding deference is to whom the Court should defer. If there is a genuine dispute, the question becomes: should the Court defer to the Legislature? Governor? Attorney General (or whatever constitutional office is involved)? Moreover, political realities may compromise the ability to resist incursion into the powers of a particular office. This problem manifested itself in both the *Barker* and *W. Va. Citizens Action Group* cases. While this Note argues that in most cases deference should be showed to the Executive Branch, the process used to reach this result will not always be clear-cut.

[263] Zasloff, *supra* note 30, at 1134 (citation omitted).

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